

The ALJ concluded that claimant's primary complaints were in her hip and buttock area and found claimant to have a 19 percent impairment to the right lower extremity for

complaints of pain in the right buttock area, with 10 percent being for piriformis syndrome and 7 percent for ischia bursitis.¹

The claimant requests review of the nature and extent of her disability. Simply put, claimant maintains her impairment is not a scheduled injury pursuant to K.S.A. 44-510d but rather, is a general bodily injury. Thus, claimant asks the Board to modify the ALJ's Award and grant her an 11 percent whole body impairment.

While respondent concedes claimant suffered a compensable injury, respondent nonetheless contends claimant has suffered no permanent impairment as a result of that injury. And to the extent claimant has any permanency, claimant's impairment is limited to a scheduled injury and is no more than 10 percent to her right lower extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein except as hereinafter noted.

This appeal involves the determination of a single issue - whether claimant's work-related injury resulted in a permanent impairment and if so, whether that impairment is to a scheduled injury pursuant to K.S.A. 44-510d² or a whole body impairment pursuant to K.S.A. 44-510e. Not surprisingly, claimant maintains her injury resulted in a whole body impairment, specifically to her buttocks and hip, neither of which are scheduled members.

Conversely, respondent contends claimant has not suffered any permanent impairment and even if she has, it is limited to a 10 percent lower extremity scheduled injury.

¹ ALJ Award (Dec. 28, 2010) at 8. The Award itself is confusing in that it first references a 19 percent impairment then references a 22 percent impairment. However, the final calculation paragraph is based upon a 19 percent permanent partial impairment and based upon the entirety of the ALJ's Award the Board believes the ALJ intended 19 percent to have been the true percentage of impairment. The 22 percent is merely a typographical error.

² This statute was set out in the ALJ's Award and will not needlessly be repeated here. Suffice it to say, K.S.A. 44-510d sets out a schedule of particular body parts the legislature has determined should be compensated in a certain way. If not contained in this schedule, an injured employee's impairment is compensated as a general bodily injury pursuant to K.S.A. 44-510e.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

Claimant was seen by a plethora of physicians for complaints of right knee, right hip and buttock pain. She underwent two diagnostic procedures, one each to her right knee and right hip. Based upon the evidence in the record, the greater weight of the evidence establishes that claimant suffers from piriformis syndrome. This condition occurs when the piriformis tendon is irritated alone or by the surrounding sciatic nerve. The piriformis tendon attaches to the piriformis muscle to bone and it is located in the sciatic notch, housed in the deepest portion of the buttock, behind and below the hip joint.⁶ According to Dr. Paul S. Stein, “it’s really not in any way a part of the hip joint.”⁷ It often causes hip pain but in its more complex form, the sciatic nerve is irritated and causes some leg and foot pain.⁸

Dr. Bradley R. Dart, claimant’s treating physician was familiar with piriformis syndrome but did not diagnose that condition, although he acknowledged claimant was continuing to complain about hip and buttock pain and experienced a “popping” sound in her hip or leg while she walked. He referred claimant to Dr. Ronald L. Brown, for pain management and released her from his care. Dr. Brown provided claimant with an injection *to her right buttock* that albeit temporarily, resolved claimant’s complaints of pain. After a few months, the pain returned.

³ K.S.A. 2007 Supp. 44-501(a).

⁴ K.S.A. 2007 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁶ Stein Depo. at 22-23.

⁷ *Id.* at 23.

⁸ *Id.* at 22.

Dr. George G. Fluter, a physiatrist who evaluated claimant on two separate occasions at her attorney's request (both before and after surgery), agreed that claimant suffers from piriformis syndrome as well as ischial bursitis and bears range of motion deficits in the hip, all due to her injury.

Claimant was also evaluated by Dr. Stein, pursuant to the ALJ's request. Dr. Stein initially found that claimant had no permanent impairment although he acknowledged claimant had ongoing complaints of buttock and hip pain and had an audible popping sound emanating from her hip or leg. He further acknowledged that he suspected claimant had piriformis syndrome. But because he had no conclusive proof of the condition, even after a nerve conduction study and an MRI was performed, which showed no evidence of root damage or spasticity, findings which he would have expected to see, he declined to issue any sort of impairment. However, at his deposition, he was presented with Dr. Brown's records which showed that after injections, claimant achieved complete (although temporary) relief from the pain complaints to her buttock and hip. Based upon this evidence, he revised his opinion and agreed that claimant did, in fact, suffer from piriformis syndrome. He went on to assign a 10 percent impairment to claimant's right lower extremity, which when converted, is between a 4 and 5 percent whole body impairment.⁹

Dr. Stein confirmed that the source of claimant's impairment is not in the hip, but is in the buttock.¹⁰

The ALJ noted that -

Most of [c]laimant's functional impairment is in her right hip and buttock area. While most of Dr. Stein's opinion as to the nature and extent of [c]laimant's impairment is persuasive[,] [c]laimant's impairment to her right lower extremity is more extensive than what was found by Dr. Stein. Claimant's complaints and testimony as well as Dr. Fluter's opinion are persuasive that [c]laimant's functional impairment is greater than ten percent to the right lower extremity. . . For these reasons it is found and concluded that [c]laimant's functional impairment is ten percent for the piriformis syndrome, seven percent for ischia bursitis and five percent for range of motion deficits in her right hip.¹¹

She then went on to award claimant a 19 percent permanent partial impairment *to the right lower extremity*.

In the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma,

⁹ *Id.* at 26-27.

¹⁰ *Id.* at 27.

¹¹ ALJ Award (Dec. 28, 2010) at 7-8.

which determines the workers' compensation benefits available.¹² After considering the entire record, the Board finds the Award must be modified. It is abundantly clear from the medical testimony that claimant's impairment, the situs of her disability, is in the buttock and/or hip area. It is not in claimant's leg, although it is true that she experiences leg pain. Even so, the uncontroverted evidence shows that the source of her impairment and the situs of her disability is located in her buttock, under the hip. The Board finds this is not a scheduled injury. Rather, it is an injury that has resulted in a whole body impairment.

Dr. Stein testified that the piriformis syndrome entitled claimant to a 4-5 percent whole body impairment. The testimony and opinions offered by Dr. Dart and Dr. Flutter are not as persuasive as those provided by Dr. Stein, the independent medical examiner. Dr. Dart discharged claimant from his care before her true diagnosis was determined. And Dr. Flutter identified a number of conditions that none of the other physicians identified or diagnosed. Based on this evidence, facts and circumstances, the Board finds Dr. Stein's opinion as to claimant's true condition is the more persuasive of the three. Accordingly, the Board modifies the Award and grants claimant a 4 percent permanent partial whole body impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated December 28, 2010, is modified and claimant is hereby awarded against respondent a 4 percent whole body impairment.

The claimant is entitled to 12.83 weeks of temporary total disability compensation at the rate of \$369.59 per week or \$4,741.84 followed by 16.60 weeks of permanent partial disability compensation at the rate of \$369.59 per week or \$6,135.19 for a 4 percent whole body impairment, making a total award of \$10,877.03.

As of April 13, 2011 there would be due and owing to the claimant 12.83 weeks of temporary total disability compensation at the rate of \$369.59 per week in the sum of \$4,741.84 plus 16.60 weeks of permanent partial disability compensation at the rate of \$369.59 per week in the sum of \$6,135.19 for a total due and owing of \$10,877.03, which is ordered paid in one lump sum less amounts previously paid.

¹² *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

IT IS SO ORDERED.

Dated this _____ day of April 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge